JOHN D. CORBETT
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
NY315H19001

OPINION AND ORDER

John D. Corbett, appellant, was terminated from his position with the Department of Health and Human Services during his probationary period of employment. The agency terminated appellant because of alleged falsification of his employment application. Specifically, the agency alleged that appellant had intentionally failed to fully answer that he had five prior convictions and instead responded in a manner which was intended to mislead the agency into believing that he had been convicted only once for a minor offense.[1]

Mr. Corbett appealed the termination to the Board's New York Regional Office. In a pre-hearing order, later incorporated into the final decision, the presiding official held that 5 C.F.R. § 315.806, which provides a limited right of appeal to probationary employees terminated for reasons arising before employment, was invalidly implemented. He then determined that the Board did have jurisdiction to review the merits of terminations in such cases. After a hearing, the presiding official found the charges to be supported by the evidence and sustained the agency action.

On November 7, 1980, the Board reopened this case on its own motion. The Board, in its order, requested the parties to address the following questions:

> (a) Whether the Board may adjudicate the appeal of a probationary employee from termination for pre-appointment reasons, when the appeal does not allege that the action was based on discrimination referred to in 5 C.F.R. § 315.806(b) or that the termination was procedurally improper.
>
> (b) If the above is answered in the negative, whether the disparity between the appeal rights provided under 5 C.F.R. § 315.806(a) and those provided under 5 C.F.R. § 731.401 is lawful.

Subsequent to issuance of the foregoing order, the appellant filed a petition for review of the initial decision. In the petition, the appellant contended that the agency had not proved that he had intentionally

[1] In response to the question concerning prior convictions—the appellant indicated "yes"; in response to the request for specific information—he wrote "disorderly conduct (don't remember details)." An investigation revealed that appellant had in fact been convicted five times, from 1965 to 1977, for varying misdemeanors, two of which were for disorderly conduct.

falsified his application and he asserted that he had not been given full and fair opportunity to respond to the charges. The Office of Personnel Management (OPM) filed a brief in response to the Board's November 7, 1980 order, and the appellant filed a response to OPM's brief and submitted further argument, but the agency made no submission.

An employee in the competitive service who is serving a probationary period under an initial appointment is not included within the definition of "employee" for purposes of Chapter 75 of Title 5 of the United States Code. 5 U.S.C. §§ 7501, 7511. Accordingly, such employees have no statutory right to appeal adverse actions as set forth in that chapter.[2]

Despite the exclusion of probationary employees from the rights set forth in 5 U.S.C. Chapter 75, the Office of Personnel Management has extended certain rights to probationary employees.[3] 5 C.F.R. § 315.806 provides, *inter alia*, that a probationary employee who is terminated for preemployment reasons may appeal the agency's decision to the Board on the ground that the termination was not effected in accordance with the procedural requirements of 5 C.F.R. § 315.805.[4] Therefore, the plain language of 5 C.F.R. § 315.806 limits the Board from reviewing the merits of the case.

Despite the limited jurisdiction granted the Board in 5 C.F.R. § 315.806, the presiding official held that the limitation of that section was not rational, and he determined that the Board could review the merits of the instant action. The underpinning of this conclusion was the comparison of rights granted applicants and other probationary employees under 5 C.F.R. § 731.401 with the rights accorded appellant under 5 C.F.R. § 315.806. The presiding official reasoned that since applicants and probationary employees who were determined unsuitable by OPM pursuant to 5 C.F.R. § 731.201 *et seq.*, were entitled to contest the merits of the determination in an appeal to the Board, it was a denial of equal protection not to allow appellant the same right under 5 C.F.R. § 315.806. Therefore, he reasoned that if he adhered to 5 C.F.R. § 315.806 as written he would be committing a prohibited personnel practice in violation of 5 U.S.C. §2301(b)(2), which states that employees should receive fair and equitable treatment in regard to personnel actions, with

[2]Such actions include, among other things, removals of employees for such cause as will promote the efficiency of the service. 5 U.S.C. §§ 7512, 7513.

[3]The President was authorized to create a separate group of competitive service employees—employees serving a period of probation—pursuant to 5 U.S.C. § 3321. Pursuant to Executive Order No. 12107, 3 C.F.R. § 264 (1978), OPM was authorized to prepare rules for administration of the competitive service.

[4]5 C.F.R. § 315.805 states that the employee is entitled to advance written notice stating the reasons for the proposed action, a reasonable time to submit a written response, and written notification of the agency's decision at the earliest practicable date. Probationers whose employment is terminated do have limited additional appeal rights granted by regulation for certain specified types of discrimination. *See* 5 C.F.R. § 315.806(b), (d). No such allegations have been made by appellant in regard to this dispute.

proper regard for their constitutional rights. This analysis is deficient as discussed below.

The presiding official determined that 5 C.F.R. § 315.806 violated the merit system principles set forth in 5 U.S.C. § 2301(b)(2). However, the merit system principles set forth in 5 U.S.C. § 2301 are intended to furnish guidance to Federal agencies and are not self-executing. *Wells v. Harris*, 1 MSPB 199, 203 (1979). Further, the presiding official misconstrued the nature of his position when he held that adjudication of the appeal in consonance with the regulations would cause him to commit a prohibited personnel practice. Adjudication of employee or applicant appeals under 5 U.S.C. § 7701 is not a "personnel action" as defined by 5 U.S.C. § 2302, and therefore could not constitute a prohibited personnel practice.

The presiding official incorrectly held that he had authority under 5 U.S.C. § 1205(e) to declare OPM regulations to be invalidly implemented. He held that such authority had been implicitly delegated to presiding officials pursuant to 5 U.S.C. § 1205(f). Nothing in 5 U.S.C. § 1205(f) constitutes a delegation of the Board's § 1205(e) authority to presiding officials, and, in fact, 5 U.S.C. § 1205(f) only authorizes delegation of "administrative functions." The delegated authority of the Board's presiding officials derives from 5 U.S.C. § 7701(b) and does not include the Board's § 1205(e) authority or other authorities within the Board's "original jurisdiction" as set forth in 5 C.F.R. § 1201.2. Of course, the absence of delegated authority under 5 U.S.C. § 1205(e) does not preclude a presiding official from considering the propriety of any regulation, or its application, in the context of a particular case pursuant to 5 U.S.C. § 7701(c)(2)(B) or § 7701(c)(2)(C).

The Board's appellate jurisdiction is expressly confined to actions appealable to the Board under any law, rule, or regulation. 5 U.S.C. § 7701(a). We do not have authority to accept jurisdiction where none exists. As we held in *Smith v. Department of the Navy*, 4 MSPB 113 (1980), even when an employee is dismissed for pre-employment reasons, in such a manner that results in stigmatization and raises a legitimate claim of a constitutionally protected "property" or "liberty" interest, the Board cannot consider the constitutional issues raised by such action if there is no law, rule, or regulation which creates jurisdiction in the Board. In his concurring opinion Member Wertheim noted: "Even if the Due Process Clause of the Constitution entitles Smith to some form of fair administrative appeal, nothing in the Constitution mandates that such appeal be to this Board. The Constitution, therefore, is of no direct avail to Smith on the threshold jurisdictional issue before this board." *Id.*, n. 13 (Wertheim concurring). In addition Member Wertheim stated:

> . . . the *failure* of OPM's regulations to grant jurisdiction to the Board, no matter how erroneous or unauthorized such failure may be as a matter of substantive law, cannot in itself constitute a *grant*

of such jurisdiction. The Board has no authority to correct omission in its own regulatory jurisdiction. . . . (emphasis in original).

Id., 122.

Similarly, we cannot, *sub silentio*, rewrite 5 C.F.R. § 315.806 to give this Board jurisdiction over the merits of appellant's case. Although this issue was not directly addressed by the presiding official, he appears to have attempted to dispose of the problem by stating that "once avenues of appellate review have been established, they must be kept free of unreasonable distinctions which impede open and equal access to review." August 12, 1980 Order at 4. As partial support for this statement he relied on *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

Rinaldi involved the question of whether it was a denial of equal protection for the state to require payment for costs of appellate transcripts from unsuccessful appellants who were sentenced to prison. The statute did not require payment by unsuccessful appellants who were given sentences other than imprisonment, i.e., probation, fines. In the opinion, the Court did state that once avenues of appellate review are established by states, the avenues must be kept free of unreasonable distinctions which impede open and equal access. Maintaining open and equal access for persons entitled to seek relief in a specific forum, however, is something quite different from creating a substantive right to obtain relief in the forum.

In summary, we conclude that the jurisdiction of this Board to review the instant case is limited to review of the procedural requirements of 5 C.F.R. § 315.805, and that the issue of the constitutionality of 5 C.F.R. § 315.806(c) cannot be considered since it is not within the Board's jurisdiction.

Accordingly, the initial decision is AFFIRMED as modified herein and the agency action is sustained.

We note that appellant, in his petition, argued that he was not given adequate opportunity to respond to the proposed removal notice. This argument is not supported by any new evidence which was previously unavailable despite due diligence, nor has the appellant alleged that the decision of the presiding official is based on an erroneous interpretation of statute. 5 C.F.R. § 1201.115. In light of our findings regarding the scope of the Board's jurisdiction, the remaining issues raised by appellant in his petition for review are moot. Therefore, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision as modified shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *August 20, 1981*